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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In The Matter of the)	
Application of)	WT Docket No. 95-11
)	
HERBERT L. SCHOENBOHM)	
Kingshill, Virgin Islands)	
)	
For Amateur Station)	
and Operator Licenses)	

To: The Commission

WIRELESS TELECOMMUNICATIONS BUREAU'S REPLY TO EXCEPTIONS

The Chief, Wireless Telecommunications Bureau (Bureau), by his attorneys and pursuant to Section 1.294 of the Commission's Rules, 47 C.F.R. § 1.294, respectfully submits the following reply to the Exceptions to the Supplemental Initial Decision (SID) of Administrative Law Judge Edward Luton (ALJ) submitted by Herbert L. Schoenbohm (Exceptions). The Bureau's failure to address a specific argument advanced by Schoenbohm should not be construed as the Bureau's agreement with that argument. For the reasons that follow, Schoenbohm's Exceptions should be rejected and the SID affirmed in all respects

I. ARGUMENT

A. Conviction

1. Schoenbohm initially takes exception to the ALJ's conclusion that Schoenbohm misrepresented a material fact to the Commission and was lacking in candor in his testimony concerning his conviction for violation of 18 U.S.C. § 1029(a)(1). (Exceptions at pp. 3-7, 11). Schoenbohm bases his claim that he did not misrepresent material facts or lack candor on select testimony from Schoenbohm Exhibit 8 and the remand hearing. While the testimony is

accurately reproduced, it is taken out of context. The testimony on which Schoenbohm relies in this exception excludes testimony during which Schoenbohm persistently described his conviction as being based on possession of a counterfeit access device or numbers in his head rather than on the performance of any act (Schoenbohm Exhibit 1, p. 2; Tr. 38, **Tr. 44, 55-56**)¹ and repeatedly used the term "possession" (Schoenbohm Exhibit 8, p. 2; **Tr. 43, 46, 52, 54, 60-61**) but then agreed that the use of the word "possession" muddies the water" (**Tr. 66**). The testimony excluded from Schoenbohm's Exceptions is, in fact, the most significant testimony relating to the issue of whether Schoenbohm made misrepresentations or lacked candor in his testimony about his felony conviction.

2. A primary focus of the remand hearing concerned Schoenbohm's persistent use of the term "possession." In his Exceptions, Schoenbohm attempts to explain his use of the term "possession" in describing his conviction for using a counterfeit access device. (Exceptions at pp. 5-7). First, he asserts that subsections 18 U.S.C. §§ 1029(a)(3) and 1029(a)(4) prohibit the "possession" of a counterfeit access device. The prohibition of those subsections is irrelevant here because Schoenbohm was not convicted under those subsections but under 18 U.S.C. § 1029(a)(1), which does not include the term "possession." Second, Schoenbohm proffers that it is necessary to possess a counterfeit access device in order to use it despite the fact that the law makes no such distinction. This argument has no logical nexus to Schoenbohm's persistent use of the term "possession" in describing his conviction. Next, Schoenbohm claims that, by using the term "possession," he was trying to show that he did not possess a physical counterfeit access

¹ Transcript references shown in bold type are from the remand hearing. Those shown in non-bold type are from the first hearing.

device. This explanation is not logical; Schoenbohm could simply have said that his conviction was not for the use of any physical counterfeit access device without mentioning "possession."

3. In any event, Schoenbohm's testimony speaks for itself. At the first hearing, Schoenbohm testified in writing that he was convicted for defrauding a telephone resale service provider by making unauthorized long distance calls. (Schoenbohm Exhibit 1, p. 1). However, in written testimony at the first hearing that was prepared later (Schoenbohm Exhibit 7, p. 2) and in oral testimony at the first hearing, Schoenbohm described his conviction as being based on possession rather than on the performance of any act (Schoenbohm Exhibit 1, p. 2; Tr. 38). During the remand hearing he repeatedly used the term "possession" or "possessing" in describing his conviction (Schoenbohm Exhibit 8, p. 2; **Tr. 43, 46, 52, 54, 60-61**). In addition, Schoenbohm testified that he was "convicted solely of having knowledge in my mind of certain access codes . . ." (**Tr. 44**) and that he was convicted of "having knowledge of certain numbers that could be used for making long distance calls without paying for them." (**Tr. 55-56**)

4. There was no legitimate purpose for Schoenbohm's use of the term "possession" to describe his criminal conviction because Schoenbohm was convicted of the use of a counterfeit access device and not its possession. Even Schoenbohm eventually agreed that the use of the word "possession" muddied the water and does not fit anywhere in this case (**Tr. 66**). The ALJ, who had the advantage of being able to observe Schoenbohm's demeanor at the hearing, correctly concluded that Schoenbohm's description of his conviction in this manner was a conscious effort to influence and mislead the trier of fact and that his testimony was "an attempt to portray a softened, more benign image of the facts underlying Schoenbohm's conviction and was false." (SID, at ¶ 29)

5. Schoenbohm counters that he was entitled to present his conviction "in a softened, more benign image" so long as his testimony was truthful (Exceptions at p. 11), relying on Richard Richards, 10 FCC Rcd 3950 (Rev. Bd. 1995). Schoenbohm was, of course, entitled to testify truthfully but was not entitled to attempt to mislead the trier of fact by mischaracterizing his conviction. Moreover, the Commission's decision in Richard Richards provides support for the ALJ's decision in the SID. In Richard Richards, the applicant had been convicted of single count of possessing marijuana with intent to distribute. The Commission, while finding it to be a close call, did not believe that the conviction, based on the circumstances, disqualified the applicant from being a licensee. The Commission did state, however, that the crucial issue in determining the applicant's character qualifications is the likelihood that the applicant will deal truthfully with the Commission and comply with the Communications Act and the Commission's Rules and policies. Richard Richards, *supra* at 3955. The Commission further stated that convictions for offenses involving fraudulent conduct -- such as the conduct at issue in the Schoenbohm conviction -- reflect on the applicant's propensity for truthfulness. *Id.* Therefore, Schoenbohm's reliance on Richard Richards is misplaced.

B. Ex Parte Violation

6. Schoenbohm also argues that the ALJ's conclusion that Schoenbohm solicited an ex parte presentation, in violation Section 1.1210 of the Commission's Rules, 47 C.F.R. § 1.1210 is in error. (Exceptions at pp. 7-10, 11). Schoenbohm asserts that the ALJ's treatment of the ex parte issue raises troublesome questions as to Schoenbohm's Constitutional right to free speech and to petition the government for the redress of grievances. This argument -- which challenges the fundamental propriety of the ex parte rules -- is without merit. The Commission's ex parte

rules do not infringe upon the applicant's right to discuss this proceeding with others. They properly prohibit, however, any attempt to influence the outcome of the proceeding. Schoenbohm's attempt to get Congressional pressure asserted in an adjudicatory proceeding plainly violated the Commission's ex parte rules, and Schoenbohm has advanced no basis for overturning the SID's conclusion on this point.

7. Schoenbohm claims additionally that the ALJ erred by failing to consider the "totality" of evidence -- i.e., that the conversation resulting in the ex parte issue "was just another of [Schoenbohm's] long, generalized conversations about the rules." (Exceptions at pp. 7-9). The ALJ did consider this argument but quite properly rejected it (SID, at ¶ 34). The plain meaning of Schoenbohm's own words shows that he did solicit others to make ex parte presentations on his behalf. Schoenbohm told his listeners that he is not permitted to make any requests for "political intervention" in this matter but other people can do so. He then provided the name, address and telephone number of U.S. Virgin Islands congressional Delegate Victor Frazer. Schoenbohm went on to make specific suggestions about what should be included in any letter written to a member of Congress on his behalf -- such as suggesting that anyone writing on his behalf provide information concerning Schoenbohm's participation in emergency communications and asking the members of Congress whether the nonrenewal of Schoenbohm's amateur licenses would have any negative impact on their constituents. (Schoenbohm Exhibit 3, pp. 3-6). Based on the record evidence, the ALJ did not err in concluding that Schoenbohm had the intent to persuade others to write ex parte letters to Congress and not to just discuss his knowledge of the ex parte rules, as he asserts. As demonstrated above, Schoenbohm clearly attempted to persuade others to write in his behalf.

8. Schoenbohm also argues that it would have been illogical for him to ask others to contact Delegate Frazer on his behalf because he was a friend of Frazer's and did not need others to act as intermediaries. (Exceptions at p. 9). This argument is similarly without merit. As Schoenbohm acknowledged during the recorded over-the-air discussion, he "is not allowed under the ex parte rules to ask for assistance [from] people in political positions." (Schoenbohm Exhibit 3, p. 3). This language clearly dispels Schoenbohm's argument that he would not need others to contact Delegate Frazer.

9. Schoenbohm attacks the ALJ's conclusion that on April 3, 1995, he knew or should have known that the Commission's Rules prohibit the solicitation ex parte presentations in restricted proceedings. (Exceptions at pp. 9-10). First, ignorance of the Commission's Rules is never an adequate excuse for noncompliance. See, e.g., Martin W. Hoffman, FCC 97-155 (released August 5, 1997); Calvary Educational Broadcasting Network, Inc., 7 FCC Rcd 4037 (1992); Douglas R. Casey, 3 FCC Rcd 7293 (1988). Furthermore, Schoenbohm retained an attorney who informed him during March 1995 that the Commission's Rules prohibit him from making ex parte presentations related to this proceeding. (Schoenbohm Exhibit 7, p. 1; **Tr. 91**). According to Schoenbohm, however, the attorney did not inform him that he is also barred from soliciting ex parte presentations by others on his behalf. (**Tr. 109**). With the knowledge that ex parte presentations are prohibited, it is unreasonable for Schoenbohm to have assumed that this prohibition can be evaded by simply soliciting others to make ex parte presentations. Thus, even if Schoenbohm's attorney did not specifically inform him that solicitation of ex parte presentations is prohibited, Schoenbohm should have known, when he made transmissions on April 3, 1995, that he was not allowed to solicit an ex parte presentation.

10. Schoenbohm argues as a matter of mitigation that the Commission never received any ex parte communications on Schoenbohm's behalf. (Exceptions at p. 11). The rule Schoenbohm violated, 47 C.F.R. § 1.1210, prohibits solicitations of ex parte presentations. That Schoenbohm's solicitation apparently did not result in any ex parte presentations is fortuitous and has no bearing on Schoenbohm's improper solicitation.

C. Other Matters

11. Next in his Exceptions, Schoenbohm makes a pot pourri of arguments (Exceptions at pp. 10-11): that Schoenbohm has an "outstanding amateur record" and has "never been found to have violated any of the FCC's amateur rules"; that the conduct on which Schoenbohm's criminal conviction is based, which occurred in 1987, is "remote in time"; that the judge who sentenced Schoenbohm in the criminal proceeding did not consider his crime to be serious because she sentenced him to only a \$5,000 fine and two months of house arrest without any jail time²; and that Schoenbohm has had a "spotless record" since his conviction and he has been "fully rehabilitated." None of these arguments raised by Schoenbohm has merit. The evidence adduced at the hearing does not support Schoenbohm's claims that he has an outstanding amateur record and has never been found to have violated any of the FCC's amateur rules. Schoenbohm's conviction is not remote in time. In a renewal case, any misconduct occurring within the current license term can be considered. Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1229 (1985), recon. denied, 1 FCC Rcd 421 (1986), modified, 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991) (Character Policy Statement). Schoenbohm's misconduct occurred during his current license term, which began on March 2,

² In fact, Schoenbohm was also sentenced to two years of probation.

1984, and has been extended by the pendency of his renewal application. Because the Commission began this proceeding promptly after the Third Circuit rejected Schoenbohm's appeal, it cannot be considered stale. There is nothing in the record to support Schoenbohm's claim that the judge who sentenced him did not consider his crime to be serious. Furthermore, the sentencing judge's view of the seriousness of Schoenbohm's crime is not at issue here. What is important is that Schoenbohm engaged in criminal fraud. Therefore, the ALJ in this proceeding properly found that Schoenbohm is not an applicant whom the Commission can trust to be truthful. Finally, Schoenbohm does not have a spotless record since his conviction and has not been rehabilitated. His record since conviction includes soliciting an ex parte presentation, misrepresentation of material facts to the Commission and a lack of candor. Schoenbohm has proffered no substantial evidence to demonstrate his rehabilitation. Specifically, he did not call any witnesses to testify about his reputation in the community for truthfulness and the fact that Schoenbohm, who was regularly employed both before and after his conviction, obtained a higher paying job, is not evidence of rehabilitation. Moreover, Schoenbohm's record since conviction precludes any notion that he has been rehabilitated.

12. The cases cited by Schoenbohm -- Richard Richards, supra, and Alessandro Broadcasting Co., 56 RR 2d 1568 (Rev. Bd. 1984) -- as examples of cases where convicted felons have been allowed to renew their licenses are inapposite. Neither case involves an individual convicted of fraudulent activities. The Commission stated in its Character Policy Statement that "convictions not involving fraudulent conduct are generally not relevant to an applicant's propensity for truthfulness and reliability" Character Policy Statement, 102 FCC 2d at 1197 (footnote omitted). Because Schoenbohm's conviction did involve fraudulent activity,

his conviction directly reflects on his reputation for truthfulness. It is all the more disturbing that Schoenbohm's fraudulent activity was communications-related.

D. Attempt To Supplement Exceptions

13. Schoenbohm attempts to supplement his exceptions with documentary exhibits consisting of a letter and a declaration. However, neither was ever made part of the evidentiary record in this proceeding. The record was closed on the date of the remand hearing, April 1, 1997, and has not been reopened. Schoenbohm, moreover, has made no attempt to have the record reopened and to have these documents introduced as evidence and there is no basis for believing that the ALJ ever considered these materials in his SID. Consequently, the Commission should disregard both documents.

CONCLUSION AND OPPOSITION TO ORAL ARGUMENT

14. Schoenbohm has been convicted of a felony involving fraudulent conduct in a communications service regulated by the Commission. This conviction is strong evidence that Schoenbohm cannot be relied upon to deal truthfully with the Commission or to comply with the Commission's rules. See Character Policy Statement, 102 FCC 2d at 1196-97. He has compounded the effect of his felony conviction by misrepresenting material facts to the Commission, lacking candor, and flouting the Commission's ex parte rules. Schoenbohm's post-conviction behavior shows that he is fundamentally unreliable. It is, therefore, evident that Schoenbohm does not possess the requisite qualifications for a renewal of his amateur station and operator licenses. Schoenbohm's Exceptions should be denied and the SID should be affirmed.

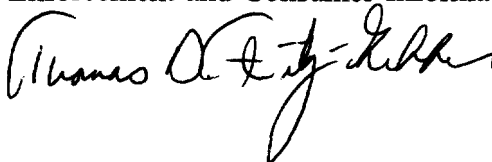
15. Finally, Schoenbohm's request for oral argument should be denied. Schoenbohm has presented no justification for oral argument in this case and the Bureau believes that oral argument would serve no purpose.

Respectfully Submitted,

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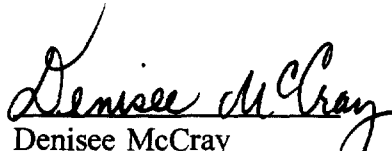
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December 18, 1997

Certificate of Service

I, Denisee McCray, certify that, on December 18, 1997, copies of the foregoing Reply Brief, filed on behalf of the Chief, Wireless Telecommunications Bureau, were sent by First Class Mail to:

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